

1 John A. Furlong, Bar No. 018356  
2 General Counsel  
3 STATE BAR OF ARIZONA  
4 4201 North 24th Street, Suite 200  
5 Phoenix, Arizona 85016-6288  
6 Telephone: (602) 252-4804  
7 John.Furlong@staff.azbar.org

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO AMEND RULES  
5(c) AND 6(e), ARIZONA RULES  
OF CIVIL PROCEDURE

Supreme Court No. R- \_\_\_\_\_

**Petition to Amend Rules 5(c) and 6(e),  
Arizona Rules of Civil Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona hereby petitions this Court to amend Rules 5(c) and 6(e) of the Arizona Rules of Civil Procedure. These proposed amendments are intended to permit service through either a court-authorized electronic transmission system or, when an attorney is being served on behalf of a party, by electronic mail:<sup>1</sup>

(a) Arizona courts are moving toward an electronic filing system through the AZTurboCourt project. That system is expected to enable full electronic filing of all court documents in all cases throughout the state by the end of 2011, and it will permit service of filings through the courts' electronic transmission system. With the availability of such functionality, Rule 5(c) should be amended to expressly permit service by these means.

---

<sup>1</sup> The proposed amendments to Rule 5(c) also correct two small typographical errors, one with respect to an inconsistency in capitalization in Rule 5(c)(2)(C), and the other with respect to a misspelling of the word "judgment" in Rule 5(c)(4).

1 (b) Under current Rule 5(c)(2)(D), one can effect service by  
2 electronic mail only if the other side consents or if the court orders service in that  
3 manner. In today's world, electronic mail has become the prevailing method for  
4 communicating with and sending materials to others. By administrative order,  
5 this Court, in 2009: (1) required all attorneys to designate and keep current an  
6 email address on every filing and pleading with the superior and appellate courts  
7 and with the State Bar; and (2) permitted the clerks of all courts to distribute  
8 documents by email in lieu of paper distribution. Given the prevalence of  
9 electronic mail and its current use by our courts, Rule 5(c) should be amended to  
10 permit service by email on attorneys of record.

11 (c) In conjunction with the added methods of service by court  
12 transmission and electronic mail, Rule 6(e) should be amended to include these  
13 methods of service to the provision adding five calendar days when service is  
14 effected by any method other than hand delivery.

15 Attached as Appendix A is a redline version of the proposed amendments  
16 to Rule 5(c) and a proposed comment; attached as Appendix B is a redline version  
17 of the proposed amendments to Rule 6(e).

18 **Rationale Supporting the Proposed Addition of Rule 5(c)(2)(D)**  
19 **Permitting Service Through a Court-Authorized Electronic Transmission**  
20 **System**

21 As set forth in Administrative Order No. 2009-74, entered by the Court in  
22 July 2009, "the Judicial Branch has embarked on a multi-phase, statewide project  
23 known as AZTurboCourt. AZTurboCourt will eventually enable full electronic  
24 filing of all court documents in all cases in every state, county, and municipal  
25 court in Arizona." In May 2010, through Administrative Order No. 2010-58, the  
26 Court began implementation of Phase II of AZTurboCourt as a pilot program in  
the Superior Court in Maricopa County, thereby allowing users to electronically

1 file court documents. The State Bar understands that full electronic filing in all  
2 cases throughout the state is expected by sometime in 2011. The State Bar further  
3 understands that part of the functionality of the electronic court filing system will  
4 be to permit service on registered users by providing them with electronic notice  
5 and access to the filing.

6 Under the current version of Rule 5(c), there is no provision permitting  
7 service through a court's electronic transmission system absent consent or court  
8 order. *See* Ariz. R. Civ. P. 5(c)(2)(D) (allowing service "by any other means,  
9 including electronic means" only with consent or by court order). Given the  
10 availability in the near future for service through AZTurboCourt, Rule 5(c) should  
11 be amended to allow such service as a matter of right. Specifically, the State Bar  
12 proposes amending Rule 5(c) to include a provision allowing use of a court-  
13 authorized electronic transmission system to effect service. The proposed  
14 provision would provide for service to be effective upon transmission, which is  
15 consistent with the wording of current Rule 5(c)(2)(D).

16 The proposed amendment would align Rule 5(c)(2) with current practice in  
17 the federal trial courts of this state. Under Federal Rule of Civil Procedure  
18 5(b)(3), when "a local rule so authorizes, a party may use the courts' transmission  
19 facilities to make service under Rule 5(b)(2)(E)." By local rule in the District of  
20 Arizona, "[r]egistration as an ECF user constitutes consent to the electronic  
21 service of all documents through the Court's transmission facilities for purposes  
22 of Rule 5(b)(3) of the Federal Rules of Civil Procedure." D. Ariz. LRCiv. 5.5(h).  
23 Thus, in the federal trial courts of this state, one can as a matter of right effect  
24 service on registered electronic case filing ("ECF") system users through use of  
25  
26

1 the courts' transmission facilities. The amendment proposed here would simply  
2 allow the same in our state courts.<sup>2</sup>

3 **Rationale Supporting the Proposed Addition of Rule 5(c)(2)(E)**  
4 **Permitting Service by Electronic Mail on Attorneys of Record**

5 The use of email has become prevalent in today's world, both to  
6 communicate with and send documents to others.<sup>3</sup> Email is also widely used in  
7 the legal community. Notwithstanding these facts, service by email is not  
8 currently permitted under Rule 5(c) unless the parties specifically consent to or  
9 the court specifically orders its use. In light of the widespread use of email, and  
10 given recent administrative orders from this Court requiring all attorneys to have a  
11 designated email address to which court clerks can send minute entries, opinions,  
12 orders and other documents, the State Bar believes that Rule 5(c) should be  
13 amended to permit service by email on attorneys of record.

14 While perhaps in the past not every lawyer had an email address or  
15 necessarily used email, that is no longer the case. This Court now requires every  
16 attorney to maintain an email address and to designate and keep that email address  
17 current with both the State Bar and any courts in which the attorney has matters  
18 pending. Specifically, pursuant to Administrative Order No. 2009-01, entered by  
19 this Court in January 2009:

---

20  
21 <sup>2</sup> Like the federal rule, the proposed amendment is silent as to whether pro se litigants  
22 may serve (or be served with) filings under the rule. As with the federal system, whether they  
23 may do so should be determined by whether they are eligible to register for AZTurboCourt. If the  
24 Court decides that pro se litigants are eligible to do so for the purposes of electronically filing  
documents, there is no reason why they should not also be able to take advantage of the system's  
capability to automatically provide electronic service. Currently, pro se litigants are not eligible  
to register for the ECF system in the District of Arizona. D. Ariz. LRCiv 5.5 (d).

25 <sup>3</sup> A May 2010 survey by the Pew Research Center shows 79 percent of American adults  
26 use the Internet, with 94 percent of those users sending or reading email. A May 2009 study by  
The Radicati Group, a technology market research firm, estimated that worldwide email traffic in  
2009 totaled 247 billion messages per day.

1 All attorneys, individually or as a firm or office, shall  
2 designate and keep current with the State Bar of Arizona,  
3 not later than July 1, 2009, an e-mail address to which  
4 official court documents may be sent. The Board of  
5 Governors, through the Executive Director of the State  
6 Bar of Arizona, shall work with the AOC to see that such  
7 a system is established and kept updated. This e-mail  
8 address shall be provided with all filings and pleadings  
9 on and after July 1, 2009.

10 Similarly, by Administrative Order No. 2009-43, entered by this Court in April  
11 2009:

12 By July 1, 2009, every attorney who files matters into the  
13 county superior or state appellate courts, shall designate  
14 and maintain an e-mail address to which official court  
15 documents will be sent. Attorneys shall include the  
16 designated e-mail address on each filing and pleading  
17 filed with a county superior or state appellate court. In  
18 the event that an attorney's e-mail address changes, the  
19 attorney shall indicate that the address is a changed  
20 address on subsequent filings and pleadings. In addition  
21 to the change of address notice requirements of  
22 Rule 5.1(b), Rules of Civil Procedure, each attorney or  
23 law firm shall advise the clerk of court and court  
24 administrator, in each of the counties in which that  
25 attorney or firm has cases pending, of any change to the  
26 current designated e-mail address.

20 In conjunction with these requirements now placed on all attorneys in the state,  
21 the clerks of the superior courts, the court of appeals and the Supreme Court "are  
22 authorized to electronically distribute any document . . . by e-mail or electronic  
23 link in lieu of distribution of paper versions by regular mail." Administrative  
24 Order No. 2009-43.

25 Given that all attorneys in the state are now mandated to maintain and keep  
26 current an email address and to designate that address with the State Bar and on

1 all court filings, and given that the courts are authorized to distribute documents  
2 by email, the State Bar believes that an amendment to Rule 5(c) permitting email  
3 service by parties (and not just by the courts) is appropriate. The courts of this  
4 state are moving away from a paper world toward an electronic one. As part of  
5 that move, parties should be permitted to effect service through the use of email  
6 on attorneys of record.

7 As discussed above, the State Bar understands that in the near future parties  
8 will have available to them the courts' electronic transmission system for  
9 purposes of effecting service by electronic means. The State Bar believes,  
10 however, that opening up the use of email for effecting service will still serve a  
11 legitimate and substantial function given that documents not filed with the court  
12 (e.g., disclosure statements, discovery requests and responses, and Rule 68 offers  
13 of judgment) will still require service by some means other than the courts'  
14 electronic transmission system.

15 To the extent concerns exist over the use of email service even in the face  
16 of email's widespread use in today's world—including by our courts—the  
17 amendment proposed here contains the following safeguards:

18 • Service can only be made on attorneys of record. The proposed  
19 amendment would allow email service only on attorneys of record, who, as  
20 discussed above, are already required to designate an email address on filings and  
21 pleadings filed with the court and to keep that email address current. In addition,  
22 the proposed amendment requires that email service be sent to all individual  
23 attorneys of record for the party being served and to any firm email address  
24 designated by an attorney of record, thus providing further assurances of receipt  
25 of the email service.<sup>4</sup>

---

26 <sup>4</sup> The proposed amendment would not authorize electronic service on a pro se litigant. In discussions leading to the proposal of these amendments, concerns were expressed about whether

1       • Identifying information required in the email’s subject line. To alert the  
2 recipient that he or she is being served pursuant to Rule 5(c) and to avoid any  
3 issues with email spam filters inadvertently capturing served items, the proposed  
4 amendment requires the subject line of the email to begin with the phrase “Case  
5 Activity” and to identify both the court and cause number of the action. Such  
6 information tracks closely with the information provided in the subject line of  
7 ECF service provided through the U.S. District Court for the District of Arizona.

8       • Papers served by email must be in PDF. To avoid any issues that might  
9 arise over the format of papers served by email, the proposed amendment requires  
10 that papers served by email be in portable document format (“PDF”). PDF is a  
11 widely used document file format supported by Adobe Systems, whose Adobe  
12 Reader can be downloaded for free from [www.adobe.com](http://www.adobe.com) and elsewhere.

13       • The proposed amendment is not intended to alter existing law regarding  
14 evidence of non-service. Under Arizona law, evidence that service did not reach  
15 the intended recipient can rebut the presumption that service has been effected.  
16 *See McEvoy v. Aerotek, Inc.*, 201 Ariz. 300, 305 ¶¶ 23-24, 34 P.3d 979, 984 (App.  
17 2001). The State Bar proposes having a comment accompanying the rule  
18 amendment that clarifies that this principle also applies to email service. For  
19 example, the party attempting email service might receive back an automated  
20 message that the email did not reach the recipient due to an incorrect email  
21 address, size limitations on the recipient’s mailbox, or for other reasons. The  
22 comment notes that in such a situation, the serving party is on notice that service  
23 may not be effective on the intended recipient.

24  
25 it was fair to expect pro se litigants to regularly check their email inboxes for served items. The  
26 proposed amendments, however, retain the reference to service by “electronic means” in  
Rule 5(c)(2)(D) (redesignated as Rule 5(c)(2)(F) in Appendix A), which would permit service on  
a pro se litigant if the parties consent to it or if a court authorizes it in a particular case.

1                   **Rationale Supporting the Proposed Amendment of Rule 6(e)**

2           The proposed amendments to Rule 5(c)(2) would necessitate a slight  
3 revision to Rule 6(e), which provides for the addition of five calendar days  
4 whenever a party has the right or is required to perform some act within a  
5 prescribed period of time after service and service is effected by some means  
6 other than hand delivery. Amending Rule 6(e) to add the extra five days when  
7 service is effected, either through the courts' electronic transmission system or by  
8 electronic mail, is consistent with the fact that the rule currently provides for the  
9 extra five days when service is effected by electronic means by consent of the  
10 parties or by order of the court. Such an amendment is also consistent with the  
11 federal rules, which add time when service is effected through the courts'  
12 transmission facilities.

13                   **Conclusion**

14           The State Bar respectfully requests that the Court amend the Arizona Rules  
15 of Civil Procedure to amend Rules 5(c) and 6(e) as shown in Appendices A and B.

16           RESPECTFULLY SUBMITTED THIS 5<sup>th</sup> day of January, 2011.

17  
18                     
19                   John A. Furlong  
20                   General Counsel

21           Electronic copy filed with the  
22 Clerk of the Supreme Court of  
23 Arizona this 5<sup>th</sup> day of January, 2011.

24           By: Kathleen A. Lundgren  
25  
26



## **APPENDIX A**

***State Bar's Proposed Changes to Rule 5(c)***

*(proposed additions are shown by underscoring and deletions are shown by "strike-through")*

**Rule 5(c). Service After Appearance; Service After Judgment; How Made**

(1) *Serving an Attorney.* If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) ~~M~~mailing it via U.S. mail to the person's last known address—in which event service is complete upon mailing; ~~or~~

(D) using a court-authorized electronic transmission system—in which event service is complete upon transmission;

(E) sending it by email in Portable Document Format (with the email's subject line beginning with the words "Case Activity" and including court and cause number) to the last known individual email address and firm email address (if any) designated on a filing in that action by each attorney of record for the party being served—in which event service is complete upon transmission; or

(~~D~~F) delivering the paper by any other means, including electronic means, if the recipient consents in writing to that method of service or if the court orders service in that manner—in which event service is complete upon transmission.

(3) *Certificate of Service.* The date and manner of service shall be noted on the original of the paper served or in a separate certificate. If the precise manner in which service has actually been made is not so noted, it will be conclusively

presumed that the paper was served by mail. This conclusive presumption shall only apply if service in some form has actually been made.

(4) *Service After Judgment.* After the time for appeal from a judgment has expired or a judgment has become final after appeal, the service of a motion, petition, complaint or other pleading required to be served and requesting modification, vacation or enforcement of that judgment, shall be served pursuant to Rules 4, 4.1 or 4.2, as applicable, of these rules as if serving a summons and complaint.

### **State Bar Committee Note**

#### **2012 Amendment**

Rule 5(c)(2)(D) allows for service through the court's electronic transmission system on any registered user of that system. Service by the court's electronic transmission system is complete upon "transmission," which occurs when the sender performs the last act that is required of the sender. Rule 5(c)(2)(E) allows for service on attorneys by email. Service by email is complete upon "transmission," which occurs when the sender executes the "send" command for the email.

As with other modes of service, evidence that the intended recipient did not receive a paper served by the court's electronic transmission system or by email may defeat the presumption that service was effected. For example, a sender is on notice that service may not have been effected on an intended recipient if the sender receives an automated delivery status notification indicating that the sender's email was not delivered to that recipient.

When serving an attorney by email, the serving party is required to include the phrase "Case Activity," the court, and the cause number of the action in the email's subject line so as to draw attention to the fact that a paper is being served

***State Bar's Proposed Changes to Rule 6(e)***

*(proposed additions are shown by underscoring and deletions are shown by "strike-through")*

pursuant to Rule 5(c). Thus, for example, the subject line should read as follows for service in a case pending in Superior Court: "Case Activity: [fill in name of county] County Superior Court, CV [fill in cause number]".

Attorneys are encouraged to cooperate with one another with respect to email service, and should freely exchange information that will facilitate email service. Such information would include any size limitations imposed by an attorney's email server on email messages and attachments.

## **APPENDIX B**

***State Bar's Proposed Changes to Rule 6(e)***

*(proposed additions are shown by underscoring and deletions are shown by "strike-through")*

[NOTE: Amendments made to text of Rule 6(e) effective January 1, 2011]

**Rule 6(e). Additional time after service under Rule 5(c)(2)(C), ~~or (D)~~, (E) or (F)**

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served by a method authorized by Rule 5(c)(2)(C), ~~or (D)~~, (E) or (F), five calendar days are added after the prescribed period would otherwise expire under Rule 6(a). This rule has no application to the distribution of notice of entry of judgment required by Rule 58(e).